No. 01-285

U.S.
NOV 9 2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

MARYELLEN THOMS, WARDEN,

Petitioner,

—v.—

MARIO ROSALES-GARCIA,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent, an inadmissible Mariel Cuban with a final order of exclusion, brought a pro se habeas petition challenging his indefinite detention by the Immigration and Naturalization Service. The court of appeals held that respondent's continued detention was unconstitutional. Subsequent to that decision, the government released respondent in the exercise of its own discretion on the ground that he did not pose a danger. Thereafter, this Court decided *Zadvydas v. Davis*, __ U.S. __, 121 S.Ct. 2491 (2001), holding that the Immigration and Nationality Act does not authorize the indefinite detention of admitted aliens and that such detention would pose a serious constitutional problem.

On October 11, 2001, subsequent to the government's filing of this petition, a different panel of the court of appeals upheld the indefinite detention of a Mariel Cuban similarly situated to the respondent. *Carballo v. Luttrell*, No. 99-5698, __ F.3d __, 2001 WL 1194699 (6th Cir. Oct. 11, 2001). The *Carballo* court stated that the decision in this case "cannot survive" *Zadvydas*. The questions presented are:

1. Whether, in light of *Carballo* as well as the government's voluntary release of respondent into the community, remand to the court of appeals is warranted.

2. Whether, even in the absence of *Carballo*, remand of respondent's case in light of *Zadvydas* would be warranted, given that *Zadvydas* did not address the constitutionality of indefinite detention of excludable aliens and that the statute at issue there also applies to "inadmissible" aliens.

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Respondent adopts petitioner's statement of the opinions below.

JURISDICTION

Respondent does not contest this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the provisions referred to in the Petition for *Certiorari* and reprinted in Petitioner's Appendix:

8 U.S.C. §1231(a)(6) (2001) provides:

> (a) Detention, Release, and Removal of Aliens Ordered Removed
>
> (6) Inadmissible or criminal aliens
>
> An alien ordered removed who is inadmissible under section 212, [8 U.S.C. §1182] removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) [8 U.S.C. §1227(a)(1)(C), (a)(2), or (a)(4)], or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

STATEMENT OF THE CASE

Respondent is in general agreement with the statement presented by petitioner, except for its contention that respondent's detention is governed by former 8 U.S.C.

§1226(e) (1994). Pet. Br. at 8.[1] Respondent submits that his detention post-April 1, 1997, was governed by and continues to be governed by 8 U.S.C. §1231(a)(6), the statute construed by this Court in *Zadvydas v. Davis*, __ U.S. __, 121 S.Ct. 2491 (2001). *See* Point 2.b., *infra*. The following additional points, some of which were included in petitioner's statement, are set forth for further emphasis:

1. *Administrative and District Court Proceedings Leading up to Court of Appeals' Decision.* Respondent has lived in this country for more than 21 years. He was placed in exclusion proceedings in 1987 and received an order of exclusion later that year. Pet. App. at 4a-5a. The government has been unable to effectuate his removal since Cuba will not take him back. Pet. App. at 5a & n.4.

In May 1997, respondent was detained by the Immigration and Naturalization Service (INS) following completion of a federal sentence. Pet. App. 6a. The INS panel that reviewed respondent's custody noted that he had demonstrated "good conduct" while in prison, had received his GED equivalence and had participated in other classes and rehabilitative programs. Pet. App. at 7a n.6. Nonetheless, it decided against his release. *Id.* Respondent remained in INS detention for approximately four years. Pet. App. at 7a, 16a.

2. *The Court of Appeals' Decision.* On January 31, 2001, the court of appeals issued its decision. The court first held that respondent's detention was governed by former 8 U.S.C. §1226(e) and that this section expressly authorized his indefinite detention. Pet. App. at 20a-23a.

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[1] The court of appeals' opinion states that in May 1997, respondent "was returned to INS custody, pursuant to 8 U.S.C. §1226(e) (1994)." Pet. Br. at 8 (citing Pet. App. 6a). However, respondent disputes that his detention was governed by that statute at that time.

As set forth *infra*, respondent submits that this decision was in error and that his detention is governed by 8 U.S.C. §1231(a)(6), the same statute that this Court in *Zadvydas* construed as not authorizing indefinite detention. *See* Point 2.b., *infra*.

The court next held that respondent's detention violated substantive due process. The court acknowledged the long-standing distinction in immigration law between the constitutional protection afforded to inadmissible aliens like the respondent who are stopped at the border before entering the country (also referred to as "excludable" aliens), as compared to those aliens who have made an entry (also referred to as "deportable" or "removable" aliens). Pet. App. 24a-26a. It also acknowledged the "entry fiction" by which excludable aliens, even though physically present in the United States, are not deemed to have made an entry but rather to be stopped at the border. *Id.* The court held, however, that under this Court's precedent, excludable aliens are protected by the Constitution. Pet. App. 27a-29a. It distinguished this Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)(upholding indefinite detention of an alien ordered excluded on national security grounds) as inapplicable to the respondent whose detention raised no national security concerns. Pet. App. 29a-33a. In addition, the court disagreed with the government and the decisions of other courts of appeals that the existence of periodic review procedures saved the respondent's detention from being indefinite. Pet. App. at 43a-44a. The court also noted that respondent was not asking to be able "to roam the United States," as the district court had found, but merely to be free from prolonged indefinite detention. Pet. App. at 10a.

The court also rejected the government's argument that, because respondent had been approved for release to a half-way house, the case was moot. Pet. App. at 15a-17a. The

court noted that INS regulations allow INS to revoke parole at any time. Pet. App. at 18a & n.15 (citing 8 C.F.R. §212.12(h)). The court thus reasoned that, even if respondent was subsequently released from detention, the case would fall under the exception to the mootness doctrine for cases that are "capable of repetition yet evading review." Pet. App. at 18a-19a.

The government thereafter filed a petition for rehearing and request for *en banc* review. In its petition the government informed the court that respondent was expected to be released to a halfway house within two weeks. The government also renewed its argument that respondent's release from custody would moot the case. While the petition for rehearing was pending, INS released respondent to a halfway house. Pet. Br. at 13. Thereafter, the court of appeals denied the petition.

3. *Relevant Developments since Court of Appeals' Decision.* Shortly after the petition for rehearing and *en banc* review was denied, respondent completed the halfway house program and INS released him into the community. This release was based on the government's determination that respondent's release posed no threat to the community. *See* 8 C.F.R. §212.12(d)(2). Since his release, respondent has been gainfully employed full time and otherwise complying with the INS's conditions of supervision.

After the court of appeals' ruling, this Court issued its decision in *Zadvydas*, a case that involved the indefinite detention of aliens who had previously been lawfully admitted to the United States, who had been ordered deported, but whose removal could not be effectuated. This Court held that the Immigration and Nationality Act, 8 U.S.C. §1231(a)(6), did not authorize continued detention where removal was not reasonably foreseeable, in light of the serious constitutional problem that would be presented by

the indefinite detention of such aliens. *Zadvydas v. Davis*, 121 S.Ct. at 2502-03. This Court rejected the government's argument that indefinite detention was authorized by *Mezei*, noting the longstanding constitutional distinction between aliens who have entered the United States and those who are stopped at the border. 121 S.Ct. at 2500. Because *Mezei* was distinguishable on this ground alone, this Court expressly noted that it did not need to address the parties' other arguments for why *Mezei* was not controlling. 121 S.Ct. at 2501. This Court acknowledged that its decision concerned only aliens who had been admitted to the United States. At the same time, it rejected the government's argument that because an alien who has been ordered deported has no right to remain in the United States, he therefore has no right to be free from "an indefinite term of imprisonment." *Id.* at 2502. In doing so, it also rejected the government's argument that the existence of periodic review procedures saved the detention from being "indefinite." *Id.*

Subsequent to *Zadvydas* and the government's *certiorari* petition in this case, a different panel of the Sixth Circuit again addressed the question of the indefinite detention of an excludable Mariel Cuban. *See Carballo v. Luttrell*, No. 99-5698, _ F.3d _, 2001 WL 1194699 (6th Cir. Oct. 11, 2001). The court of appeals in *Carballo* upheld the detention as authorized by statute and as permitted by the Constitution. It specifically rejected the Sixth Circuit's earlier decision in this case on the ground that it "[could] not survive the Supreme Court's decision in *Zadvydas*." *Id.* at *14. *Carballo* arose in the context of a successive habeas corpus action challenging the petitioner's detention. The *Carballo* court held that the petition was barred notwithstanding the decision in respondent's case because the prior decision was "fatally undermined" by *Zadvydas*. In particular, *Carballo* ruled that *Zadvydas* had affirmed the continuing vitality of *Mezei* and that *Mezei* in turn allowed indefinite detention.

REASONS FOR DENYING THE WRIT

The government filed this petition on August 14, 2001, following this Court's decision in *Zadvydas*, and prior to the court of appeals' subsequent decision in *Carballo v. Luttrell*. Rather than asking for plenary review, the government asks that the decision in respondent's case be vacated and remanded for reconsideration by the court of appeals in light of *Zadvydas*. In addition, it argues that remand would allow the court of appeals to reconsider the issue of mootness in light of respondent's current release into the community. Pet. Br. at 15.

Respondent disagrees that this Court should grant *certiorari*, vacate the decision below and remand the case to the court of appeals in light of *Zadvydas*. First, whatever merit the government's suggestion may have had when initially filed, no purpose would be served by a remand now that the court of appeals, in *Carballo*, has itself issued a post-*Zadvydas* decision that rejects the reasoning and result of the decision below and upholds the constitutionality of indefinite detention of inadmissible aliens. *See* Point 1.a., *infra*. Nor is remand warranted to allow the court of appeals to reconsider the correctness of the result in respondent's individual case because the government itself has already determined that respondent's release presents no danger and has released him as a matter of discretion *See* Point 1.b., *infra*. For these same reasons, remand is not warranted for the court to reconsider the issue of mootness. Indeed, the government makes no suggestion that the mootness issue, in itself, is of such significance to warrant remand. *See* Point 1.c. *infra*. Finally, even in the absence of the court of appeals' decision in *Carballo*, remand would not have been warranted since *Zadvydas* does not undermine the court of appeals' decision to order respondent's release. *See* Point 2, *infra*.

1.a. The government argues that remand of the case below is necessary because the court of appeals' holding that the indefinite detention of an inadmissible alien violates substantive due process conflicts with this Court's decision in *Zadvydas*.[2] However, whatever merit this argument might have had when the government filed its petition has now disappeared in light of the court of appeals' recent decision in *Carballo*. As noted above, in *Carballo*, a different panel of the court of appeals upheld as constitutional the government's continued detention of an inadmissible Mariel Cuban. In reaching this result, the court stated that its prior decision in respondent's case "cannot survive" this Court's decision in *Zadvydas*. *Carballo*, 2001 WL 1194699 at *14. Thus, the precise constitutional issue identified by the government in its petition has now been decided in the government's favor.

For reasons discussed below, respondent believes that *Carballo*'s statutory and constitutional analysis is in error. *See* Point 2, *infra*. However, *Carballo* expressly adopts the

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[2] The government also argues that the court of appeals' decision conflicts with the decisions of eight other courts of appeals. Pet. Br. at 19-20 (citing *Carrera-Valdez v. Perryman*, 211 F.3d 1046 (7th Cir. 2000); *Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000); *Chi Thon Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999); *Guzman v. Tippy*, 130 F.3d 64 (2d Cir. 1997); *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir.)(*en banc*), *cert. denied*, 516 U.S. 976 (1995); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986); *Gisbert v. United States Attorney General*, 988 F.2d 1437, *amended*, 997 F.2d 1122 (5th Cir. 1993); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982)). However, all of these cases were decided prior to this Court's decision in *Zadvydas*. *See, e.g.*, n.6, *infra* (noting how *Zadvydas* calls into question the reasoning of these decisions). Indeed, cases are already pending in a number of these circuits which revisit this issue in light of *Zadvydas*. Depending on the outcome of those cases, the issue presented here may well come before this Court. At the present time, however, there is no circuit conflict to warrant *certiorari* review.

government's view of the constitutional issue presented by this case, namely that indefinite detention of an inadmissible alien who cannot be removed does not violate due process. Pet. Br. at 17; *Carballo*, 2001 WL 1194699 at *14. In doing so, *Carballo* endorses the government's view of both *Zadvydas* and *Mezei*. Pet. Br. at 16-19; *Carballo*, 2001 WL 1194699 at *12-*14. Thus, the law of the Sixth Circuit is not what it was when the government sought *certiorari* and the holding of *Rosales* has been rejected by the decision in *Carballo*. Hence, this case no longer presents an issue worthy of this Court's attention or of national significance and eliminates any conflict among the circuits that might have existed before *Carballo* was decided.

b. Moreover, the effect of the court of appeals' decision on the detention of the individual respondent is not a basis for any action by this Court. *First*, the government itself has decided to release respondent as a matter of discretion on the ground that he is not a danger to the community. Second, even if respondent's release were solely because it was compelled by the court of appeals' decision (which it was not), the ruling is not worthy of review or remand because the issue is limited to the correctness of this single ruling with no application to other individuals. The government has already released respondent into the community in the exercise of its own discretion. Pet. Br. at 15. On or about March 22, 2001, the government released respondent into a halfway house. Pet. Br. at 13. Respondent completed the halfway house program in less than two months, and on May 16, 2001, the government released him into the community under minimal conditions of supervision. Pet. Br. at 14, 15. Since his release from a halfway house in May, respondent has been working and otherwise complying with his conditions of supervision.

In making its decision to release the respondent, the government necessarily found that he poses no threat to the

community, that he is nonviolent, and that he is not likely to violate the conditions of his parole. *See* 8 C.F.R. §212.12-(d)(2) (setting forth conditions that must be satisfied before parole of Mariel Cuban will be granted). Moreover, should he violate these conditions, he would be subject to prosecution and reincarceration under 8 U.S.C. §1253. *See also Zadvydas*, 121 S.Ct. at 2502, 2504. Thus, remand of this case to the court of appeals for the sole purpose of changing the ruling in respondent's individual case is not warranted.

c. For these same reasons, remand is not warranted to give the court of appeals an opportunity to reconsider the issue of mootness. The government argues that the court of appeals erred in its application of the "capable of repetition yet evading review doctrine." Pet. Br. at 23-24. However, even if this were the case -- which respondent disputes[3] -- it would not be a basis for remand. The government points to no intervening decision by this Court that might cause the court of appeals to reach a different result.[4] Nor does the

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[3] The government argues that revocation of respondent's parole "is uniquely within [his] control," citing the regulatory provision that authorizes revocation of parole when an alien violates conditions of release. Pet. Br. at 23 (citing 8 C.F.R. §212.12(h)(2)). However, the regulations also allow INS to revoke parole solely based on a discretionary determination that "the purposes of parole have been served." *See* 8 C.F.R. §212(h)(1). Thus, respondent can be returned to detention even without "engag[ing] in criminal activity or otherwise violat[ing] the conditions of his release." Pet. Br. at 23.

[4] The government argues that INS's discretionary release of respondent into the community is an intervening development sufficient to warrant remand, since the court of appeals was not actually presented with this situation when it rendered its opinion. Pet. Br. at 22-25. However, as the government acknowledges, the court of appeals specifically considered the prospect of respondent's release when it rendered its decision. Pet. Br. at 10 (citing Pet. App. 18a-19a); *id.* at 23. It is thus highly unlikely that remand would lead to a different result.

government suggest that the mootness issue, in itself, is of such significance to warrant action by this Court.

2. As set forth above, the Sixth Circuit's decision in *Carballo* negates the appropriateness of a remand of this case for reconsideration in light of *Zadvydas*. However, even in the absence of *Carballo*, a remand would not be warranted because nothing in *Zadvydas* undermines the court of appeals' decision to order respondent's release. Rather, *Zadvydas* provides an alternative basis for that decision, namely that the statute does not authorize his continued detention.

a. The government argues that "*Zadvydas* confirms the correctness" of those courts of appeals that have upheld the indefinite detention of Mariel Cubans, and that "the reasoning and result [of the decision in respondent's case] cannot be reconciled with *Zadvydas*' reading of *Mezei*." Pet. Br. at 20. However, in *Zadvydas* this Court specifically stated that it was not addressing the question presented here, *i.e.*, whether indefinite detention of inadmissible aliens, such as the respondent, would be constitutional. *See Zadvydas*, 121 S.Ct. at 2495 ("Aliens who have not yet gained initial admission to this country would present a very different question"). Thus, the court of appeals' constitutional holding does not conflict with *Zadvydas*. It merely addresses an issue that the Court did not expressly reach.

Moreover, the constitutional reasoning of the decision in respondent's case is entirely consistent with, and even reinforced by, *Zadvydas*'s analysis. The government emphasizes that *Zadvydas* affirmed the longstanding constitutional distinction between deportable and excludable aliens and that this Court distinguished *Mezei* on that basis. Pet. Br. at 16-17. However, the court of appeals acknowledged the distinction between excludable and deportable aliens. Pet. App. at 25a-26a ("Rosales does not challenge the govern-

ment's application of the "entry fiction" to his case"). Its decision is based on the separate proposition that even excludable aliens "are not wholly without constitutional protection," that they have a right "to be free from punishment without trial," and that, in the absence of national security concerns, the indefinite detention of respondent had "crossed the line from permissive regulatory confinement to impermissible punishment without trial." Pet. App. at 27a, 46a. The court of appeals thus distinguished *Mezei* as limited to the particular national security concerns that were present in that case. Pet. App. at 30a-33a. That question was not at issue in *Zadvydas*. *See Zadvydas*, 121 S.Ct. at 2501 (expressly noting that, in light of the excludable/deportable distinction, the Court did not need to consider other arguments for distinguishing *Mezei*).[5]

b. Furthermore, this Court's decision in *Zadvydas* provides an alternative statutory basis for the court of appeals' decision ordering respondent's release -- namely that the governing statute does not authorize his continued detention. The court of appeals applied the wrong statute to respondent's detention. *See* Pet. App. at 20a (applying former §1226(e)). The correct statute, §1231(a)(6), does not

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[5] Indeed, in many respects *Zadvydas* supports the constitutional reasoning of the decision below, while calling into question the decisions of the eight other courts of appeals that the government cites as upholding the detention of excludable aliens. Pet. Br. at 19-20. *Compare Zadvydas*, 121 S.Ct. at 2502 (holding that existence of periodic review procedures does not save detention from being indefinite); Pet. App. at 43a-44a (same), *with Barrera-Echavarria*, 44 F.3d at 1450 (detention not indefinite because of review procedures); *see also Zadvydas*, 121 S.Ct. at 2513 (Kennedy, J., dissenting)(describing majority's reasoning in *Zadvydas* as "remarkably similar" to the reasoning of the court of appeals' decision in respondent's case).

authorize indefinite detention. *See Zadvydas*, 121 S.Ct. at 2503.[6]

In *Zadvydas*, this Court held that §1231(a)(6), which was enacted by the Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (IIRIRA), and took effect on April 1, 1997, does not authorize detention when removal is not reasonably foreseeable. *Zadvydas*, 121 S.Ct. at 2503. *Zadvydas* applied this statute not only to an admitted alien with a post-April 1, 1997 removal order, but also to an alien with a final order of deportation issued before April 1, 1997. *Id.* at 2496. Consistent with *Zadvydas*, respondent's detention is governed by the same statute even though he was ordered excluded prior to 1997. The fact that respondent has a final order of exclusion rather than a final order of deportation is immaterial because the statute does not distinguish between the two.[7] Thus, because his removal to Cuba is not reasonably foreseeable, his detention is not authorized.

The government contends that respondent here is governed by a different statute. It argues, and the court of appeals held, that detention of aliens with final orders of removal issued before 1997 is governed by pre-1997 law. This argument is based on the effective date language in

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[6] Even if this Court were to find that respondent's detention is governed by former §1226(e) rather than §1231(a)(6), this Court's statutory analysis in *Zadvydas* calls into doubt the government's position, adopted by the court of appeals, that this statute *expressly* authorizes indefinite detention. *Compare* Pet. App. at 22a-23a (noting lack of limiting language in §1226(e) and lack of express exception for situation where removal cannot be effectuated) *with Zadvydas*, 121 S.Ct. at 2502-03 (noting that neither of these features constitute express authorization for indefinite detention).

[7] *See* 8 U.S.C. §1231(a)(6) (authorizing post-final order detention of an alien "who is inadmissible . . . [or] removable").

IIRIRA.[8] The government states that "because respondent was in exclusion proceedings before the April 1, 1997, effective date of [IIRIRA]," his detention is not governed by §1231(a)(6) but rather by former §1226(e). Pet. Br. at 17-18 n.4. This reasoning cannot be reconciled with *Zadvydas*, where this Court -- at the government's urging -- applied §1231(a)(6) to Zadvydas even though he had been ordered deported *prior* to IIRIRA's effective date. *See Zadvydas*, 121 S.Ct. at 2496 (noting that petitioner Zadvydas was ordered deported in 1994); *see also Zadvydas v. Underdown*, 185 F. 3d 279, 286 (5th Cir. 1999)(adopting government's argument that, because Zadvydas received a final order of deportation prior to April 1, 1997, he was not "in deportation proceedings" at the time IIRIRA took effect and was thus governed by post-April 1, 1997 law). The government offers no explanation for why an alien with a pre-April 1, 1997 exclusion order is deemed "in exclusion proceedings" for the purpose of IIRIRA's effective date, while a similarly situated deportable alien is deemed *not* "in deportation proceedings" and thus subject to the new regime.

The government's further argument -- that even if respondent's detention was governed by §1231(a)(6), this Court's statutory ruling in *Zadvydas* does not apply equally to excludable aliens -- is also without merit. *See* Pet. Br. at 17-18 n.4. The government justifies its position on the grounds that "the serious constitutional doubts that informed the Court's decision in [*Zadvydas*] do not apply to the detention of [excludable] aliens." *Id.* However, even if the indefinite detention of excludable aliens were found to present *no* serious constitutional problem, there is no basis for

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[8] IIRIRA §309(c)(1) states that, in general, the amendments made by IIRIRA "do not apply . . . in the case of an alien who is in exclusion or deportation proceedings before the [April 1, 1997] effective date." IIRIRA §309(c)(1), 110 Stat. 3009-625.

construing a single statutory provision to contain a different substantive detention authority depending on whether an alien is "deportable" or "excludable." Nothing in the text or structure supports such different interpretations. *See, e.g.*, *Zadvydas*, 121 S.Ct. at 2513 (Kennedy, J., dissenting) ("[T]hat Mariel Cubans and other illegal, inadmissible aliens will be released . . . would seem a necessary consequence of the majority's construction of the statute").

CONCLUSION

In sum, in light of the court of appeals' recent decision in *Carballo* and the other reasons stated herein, the petition for a writ of *certiorari* should be denied.

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Dated: November 9, 2001